IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 185 of 1986
AND
INCOME TAX REFERENCE No 95 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHINTAN N PARIKH
VATSAL N PARIKH
Versus
COMMISSIONER OF INCOME TAX

Appearance:
1. INCOME TAX REFERENCE No. 185 of 1986
MR JP SHAH for Applicant.
MR MANISH R BHATT for Respondent.
2. INCOME TAX REFERENCE No.95 of 1987
MR KH KAJI for Applicant.
MR MANISH R BHATT for Respondent.

CORAM : MR.JUSTICE A.R.DAVE
and

MR.JUSTICE D.A.MEHTA

Date of decision: 16/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench "B" has raised the following identically worded question of law for the opinion of this Court in both the aforesaid References.

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was liable to be taxed on capital gains on account of sale of his interest arising under the trust dated 16/5/1960 on the death of his mother Shakuntalaben ?"

2. As the facts and controversey are common we heard both the references together and dispose of by this common judgment. We have taken the facts from the Income Tax Reference No.185 of 1986 wherein the assessee was represented by learned Advocate Shri J.P.Shah. Mr.K.H.Kaji, appearing for the assessee in Income Tax Reference No.95 of 1987 has adopted the arguments advanced by Mr.J.P.Shah. Mr.Akil Qureshi, learned Standing Counsel for the revenue has appeared on behalf of the Commissioner of Income Tax in both the matters.

3. The assessees are individuals. The assessment year involved is 1980-81 and the relevant accounting period is calendar year ended on 31/12/1979.

4. There was a joint Hindu Family of Hargovandas Girdharlal which comprised of the Karta Hargovandas Girdharlal, his wife Lalitaben and Son Tulsidas Hargovandas. The Hindu Undivided Family was partitioned by registered deed on 8/4/1960. Shri Tulsidas Hargovandas received one Bungalow known as "Tulsikunj" and other movable properties in the form of shares and securities on such partition. Aggregate value of the immovable and movable properties at that time was Rs.1,70,500/-.

5. On 16/5/1960 Shri Tulsidas Hargovandas executed a trust deed whereby the properties received in partition were settled upon a trust. It appears from the record that Shri Tulsidas Hargovandas was unmarried and he was having a married sister by name of Shakuntalaben. The two assessees before us viz. Shri Chintan Parikh and

Shri Vatsal Parikh are two sons of Shakuntalaben.

6. Under the trust deed dated 16/5/1960 Shri Tulsidas retained life interest in the properties along with right of residence for his parents till their death and thereafter settled the immovable property in favour of Shakuntalaben. In the event of death of Shakuntalaben the immovable property was to go to the surviving son or sons of Shakuntalaben.

7. Smt.Shakuntalaben died on 12/10/1970. Therefore, in light of the terms of the trust deed the assessees became the owner of the intereset in the trust property and this interest in the remainderman of the properties was valued at Rs.71,585/- as on 31/12/1970 for wealth tax purpose in hands of each of the assessees.

8. On 29/12/1979 the assessees sold their respective interest in the remainderman of the property for a consideration of Rs.1,76,000/- each. Both the brothers transferred their respective interest to two different trusts. The assessee claimed in income-tax return for the year under consideration that no capital gain was chargeable under section 45 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), by appending the following note in the computation of income.

"2. I was having remainderman's interest in Tulsidas Hargovandas Trust which I have sold to Nishant Trust on 29/12/1979 for a consideration of Rs.1,76,000/-. It is submitted that as the aforesaid property did not cost anything to the assessee the capital gain is claimed exempt in view of the decision of Madras High Court in C.I.T. v/s.K.Ratnam Nadar, 71 I.T.R.433."

9. The Income Tax Officer held that remainderman's interest was an asset and became property in the hands of Shakuntalaben when the property was settled upon a trust. It was therefore held by the Income Tax Officer that by virtue of provision of section 49(1) of the Act,the cost of acquisition in the hands of the assessee was the cost in the hands of the previous owner and the last previous owner was the settlor. It was further held that an option was available to the assessee to adopt the fair market value of the asset as on the 1st. day of January,1964. As the assessee did not accept the stand of the Income Tax Officer, the I.T.O. worked out the

cost on his own by adopting value shown in the wealth tax return for the assessment year 1971-72 at Rs.71,585/which according to him was the value of the remainderman's interest on 12/10/1970. The Commissioner of Income Tax (Appeals) confirmed the assessment order and the assessee preferred Second Appeal before the Tribunal.

10. When the matter was taken up for hearing by the Tribunal there was a difference of opinion between the two learned Members who heard the appeal. The Judicial Member came to the conclusion that the assessee acquired the remainderman's interst only on 12/10/1970 when Smt.Shakuntalaben died and prior to that date the interest was not in existence and there was no "last previous owner" as envisaged by the provision of section 49 read with Explanation to sub-section (1) of the said section. Therefore, according to the Judicial Member there was no identifiable or conceivable cost of acquisition in hands of the assessee of such a interest and hence the computation provisions for charging the capital gains under section 45 of the Act would not be applicable and the assessee would not be liable to capital gains on the transaction involved.

11. The Accountant Member disagreed with the view of the Judicial Member and held that the asset sold by the assessee was not a self generated asset and the said asset came into existence only on the date of execution of the trust deed. It was further held that from the date of execution of the trust deed i.e. 16/5/1960 till point of time of death of Smt.Shakuntalaben i.e.12/10/1970 the interest in hands of the assessee was contingent. But that by itself was not sufficient to lead to the conclusion that it would not be an asset within the meaning of section 2(14) of the Act. The Accountant Member invoked provision of section 49(1)(iii)(d) of the Act and held that the remainderman's interest became the property of the assessee by that mode of acquisition and hence the cost of the assessee will be the cost of the previous owner. That the previous owner was Shri Tulsidas Hargovandas, but as Shri Tulsidas himself had acquired the property by way of partition i.e. as prescribed under section 49(1)(i) of the Act, cost in the hands of the bigger HUF will have to be adopted for the purpose of ascertaining the cost in the hands of the assessee. It is pertinent to note that the Accountant Member further held that possibly the bigger HUF had "perhaps acquired" the property otherwise than under the process mentioned u/s.49".(emphasis supplied).

12. In light of the difference of opinion between the two members who constituted the bench, the point of difference was referred to the Third member u/s. 255(4) of the Act by formulating the following question.

"Whether on the facts and in the circumstances of the case, the assessee is liable to be taxed on capital gains arising on account of sale of his interest in trust dated 16/5/1960 ?"

The Third member after hearing both the sides agreed with the view expressed by the Accountant Member. It was held that ownership is a bundle of rights and a person could not give what it does not possess. That the settlor "having created" (emphasis supplied) remainderman's interest was sufficient to justify the conclusion that he was possessed of or owned the interest; therefore it was held that previous owner in this case was the settlor who was also the owner of the remainderman's interest. In view of the fact that the assessee had executed a sale deed transferring remainderman's interest, the learned Third Member held that it was not possible to accept the contention on behalf of the assessee that such interest would not be available for a price. It was further held that though it might be difficult to compute the cost of such remainderman's interest in hands of the previous owner that should not justify the conclusion that the cost cannot be ascertained. Therefore, as per the majority view it was held that the assessee was liable to be taxed on capital gains arising of sale of the remainderman's interest and the cost of acquisition could be ascertained, though with difficulty, and it was not a case where the computation provision would not apply.

13. Mr.J.P.Shah, learned Counsel for the assessee contended that on the basis of the ratio of the Supreme Court decision in the case of C.I.T. vs. B.C.Srinivasa Setty, 128 ITR 294, the question that will have to be addressed is : Whether it is possible to visualise any purchaser for value on the date of acquisition of such an asset. Elaborating on the submission it was contended that the nature of interest will have to be borne in mind while answering the aforesaid question as Shakuntalaben was entitled to possess the property only after the death of the settlor and both the parents. That as the asset came into existence only on the day of settlement of trust it would be contingent interest in hands of Shakuntalaben and far more contingent in hands of the assessee. It was further urged that the situation in the present case would be closest to a situation where right

of tenancy is parted with. Apart from referring to the decision of Supreme Court in the case of Srinivasa Setty (Supra) he relied upon the following decisions :

[1] Evans Fraser And Co.Ltd. vs.C.I.T. 137 ITR 493.

[2] Baroda Cement And Chemicals Ltd. vs. C.I.T.158 I.T.R.636.

[3] Cadell Weaving Mill Co.P.Ltd. vs. C.I.T.249 ITR 265 (Bombay)

[4] A.Gasper vs. C.I.T. 192 I.T.R. 382 (S.C.)

[5] C.I.T. vs. Arun Kumar Sen 231 I.T.R.945 (Delhi).

[6] Shri Krishna Dairy And Agricultural Farm vs. C.I.T. 169 I.T.R. 291 (A.P.)

14. Mr.Akil Qureshi,learned Advocate on behalf of the revenue submitted that once it was established that the assessee became owner of the remainderman's interest on the death of Shakuntalaben and the assessee entered into a transaction of sale it was not necessary for the Court to consider anything further viz. whether there could be buyer in the open market for such a limited interest. It was submitted that market value or the marketability of remaindermn's interest could not be equated with cost and the cost could be arrived at and though such ascertainment was difficult it was not impossible. He further submitted that cost of acquisition had to be the cost in hands of the previous owner, the term 'previous owner' to mean as understood u/s.49(1) read with Explanation thereto; that though difficult it was possible to ascertain a definite figure in hands of such previous owner. That Shri Tulsidas had received the entire property on partition of HUF and had become absolute owner thereof, that the cost of entire property in hands of Tulsidas or in hands of HUF would always be available/ascertainable, though with difficulty, hence, the next step would be to envisage the cost of the limited interest carved out from such entire property. He therefore submitted that the Supreme Court decision in the case of Srinivasa Setty (Supra) would not apply to the facts of the case as the Supreme Court was dealing with the case of self generated asset where the emphasis was on improbability of envisaging cost in view of the fact that even date of acquisition of such self generated asset would not be known. That in the present case sale

price was available. The last previous owner viz. HUF was known and Tulsidas had divested himself of all the rights when he executed the trust deed which he could do only if he was in possession of that right. It was submitted that it would not be possible to envisage that a capital asset could have two different forms - one at the time of acquisition and the other when it was sold. In support of this proposition the decision of this Court in the case of Ranchhodbhai Bhaijibhai Patel vs. C.I.T.,81 I.T.R.446, was referred to and relied upon. Mr.Qureshi further urged that under the Wealth Tax Act it was possible to ascertain the remainderman's interest by adopting discounted value and in support of this reliance was placed on the case of C.W.T. vs. V.Pulagagiri, 212 I.T.R.156 (Madras). He therefore summed up his case by stating that the provision of section 49(1) of the Act was fully applicable to the facts of the case and the majority view of the Tribunal should be held to be correct.

15. The scheme for charging capital gains to tax can be culled out from a conjoint reading of provisions of sections 45, 48, 49 and 55 of the Act. Section 45 prescribes that on transfer of a capital asset effected in a previous year the difference arising by way of any profits or gains shall be charged to Income-tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. The terms 'capital asset` and 'transfer' are defined respectively in Sections 2(14) and 2(47) of the Act. For the purpose of computing the income chargeable as specified under section 45 mode of computation has been prescribed in Section 48 of the Act. It is laid down that for the purpose of ascertaining income which is chargeable to capital gain tax, expenditure which is incurred wholly and exclusively in connection with transfer and cost of acquisition of the asset along with cost of improvement if any, have to be deducted from the full value of consideration received or accruing on such transfer taking place. Section 55 specifies the meaning of the terms 'cost of improvement' and 'cost of acquisition' : Sub-section (2) of Section 55 of the Act states that cost of acquisition for the purpose of Sections 48 and 49 shall be as defined. In the case where capital asset becomes the property of the assessee before the 1st day of January,1964, an assessee gets an option to either adopt the actual cost of acquisition of the asset to the assessee or fair market value of the asset on the 1st day of January,1964. Section 49 lays down the modality of ascertaining cost of acquisition with reference to certain modes of acquisition specified

under sub-section (1) of the said Section. In the present case, admitted position between the parties is that capital asset was transferred during the previous year and hence the provisions of Section 45 stood attracted. The only dispute between the parties is as to ascertainment of the cost of acquisition under Sections 48, 49 and 55 of the Act read together. The Income Tax Officer had called upon the assessee to exercise option under Section 55(2) of the Act, however, the assessee did not opt to adopt the fair market value as 1.1.1964 as his case was that there is no actual cost of acquisition.

16. The trust deed executed on 16/5/1960 specifically mentions to in clause (2) that all the properties which have devolved on partition upon settlor Shri Tulsidas are of his independent and absolute ownership and possession. Vide clause (3) it is stated that the settlor divests himself of all the ownership rights and transfers all the properties to the trustees to be held in trust. Clause (5)(a) provides that the settlor will have life interest in the usufruct of the trust properties after providing for all taxes and expenses. Clause (5)(b) states that in the event of the net income being less than Rs.12,000/p.a. the trustees are bound to make good the difference from the corpus in case the settlor calls upon them to do so. Similarly, clause (5)(d) states that in case settlor falls ill, the entire expenses will have to be incurred by the trustees from the corpus of the trust property. Clause (6)(a) provides that settlor or both his parents will have the right to reside in the bungalow "Tulsikunj" without payment of any rent till their death. Clause (6)(b) specifically provides that on death of the settlor, subject to life interest to reside in the property of both the parents, Smt.Shakuntalaben will become the absolute owner of the property in question. The next stage is provided by clause (6)(c) wherein it is stated that if on the date of death of the settlor Smt.Shakuntalaben is not surviving, subject to the right of residence of both the parents, the property shall go to the son or sons of Shakuntalaben as may be alive on the said day. Clause (6)(d) provides similarly if on the date of death of settlor neither Shakuntalaben nor any of her sons are alive the property will devolve on the daughters subject to same terms and conditions. Clause (7) deals with the movable properties. However, for our purpose it is not necessary to go into the details in relation to the said settlement.

17. A question then would arise as to what is the interest that the assessee had which was settled in his favour by the settlor and what would be the point of time

when the assessee acquired right in such interest. Sections 19 and 21 of The Transfer of Property Act,1882 deal with vested and contingent interest respectively. We may usefully reproduce from the commentary by Mulla- The Transfer of Property Act, 8th Edition.

"19. xxx xxx xxx

(1) Vested interest.- Vested interest as defined in this section are to be distinguished from contingent interests as defined in Sec.21. When an interest is vested the transfer is complete, but when an interest is contingent the transfer depends upon a condition precedent. When that condition is fulfilled the transfer takes effect and the interest is vested. If the condition refers to an event, which is certain to occur, the interest dependent upon it is not contingent but is vested. If it is an uncertain event, it is contingent, for the condition may never be fulfilled and the transfer may never take effect. Thus a gift to A on the death of B creates a vested interest in A even during B's lifetime, for there is nothing more certain than death. But a gift to A on the marriage of B creates only a contingent interest, for B may never marry; but that contingent interest becomes vested if and when B marries.

The distinction between a vested and a contingent interest may seem simple, but in practice it is not always easy to distinguish the one from the other. The difficulty arises from the fact that a vested interest is not necessarily in possession. An interest may be vested and not yet in possession xxx xxx xxx"

"21(iii) An estate is bequeathed to A for life, and after his death to B if B shall then be living; but if B shall not then be living to C.A, B and C survive the testator, B and C each take a contingent interest in the estate until the event which is to vest it in one or in the other has happened".

(Source - Mulla's Transfer of Property Act, Eighth edition by Justice R.K.Abichandani).

Similarly under The Indian Succession Act,1925, Section 119 deals with date of vesting of legacy when payment or possession is postponed and Section 120 deals

with the situation when legacy is contingent upon specified uncertain event happening.

18. Applying the aforesaid test to the facts on hand we find that the interest of the assessee was contingent when the trust deed was executed i.e. on 16/5/1960. However, same vested in the assessee on 12/10/1970 when Smt.Shakuntalaben died i.e. when she predeceased settlor. Therefore, the date of acquisition of the interest in hands of the assessee would be the date of death of Smt.Shakuntalaben but that does not resolve the issue as regards the cost of acquisition. The concept of 'cost' and 'value' are too wellknown be elaborately stated. Suffice it to state that the cost of acquisition of an asset has to be actually one which is incurred, while valuation of the same asset may be dependent upon various factors which would operate jointly or severally at any given point of time. It is stated that valuation is an art, not an exact science. Emphatical certainty is not demanded nor indeed is it possible. However, in so far as the cost of an asset is concerned it has to be actual it cannot be anything more or anything less.

19. The Apex Court in the case of C.I.T. vs. Srinivasa Setty (Supra) while deciding whether transfer of goodwill could be brought to tax laid down the scheme of chargeability to capital gains in the following terms:

" xxx xxx The charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section.

All transactions encompassed by s.45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s.45 to be the subject of the charge. What is contemplated by s.48(ii) is an asset in the acquisition of which it is possible to envisage a cost : it must be an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived...."

20. This decision was applied by the Bombay High Court in the case of Cadell Weaving Mills Co.P.Ltd. vs. C.I.T. 249 I.T.R.265 at page 285 (thus) :

> "The intent of levying capital gains tax goes to the nature and character of the asset. It is an asset which possesses the inherent quality of being available on expenditure of money to a person seeking to acquire it. The Courts have repeatedly held that none of the provisions pertaining to the head "Capital gains" suggests that "capital assets" include an asset in the acquisition of which no cost at all can be conceived...."

The Court was dealing with a case where tenancy right was transferred.

21. Thus, in the case of landlord who is enjoying entire property without letting it out it cannot be stated that he is in possession of contingent right of tenancy in the entire bundle of rights which comprise his ownership. In the present case almost similar circumstances prevail. When Shri Tulsidas had not executed a trust deed he was the full and absolute owner of the property in question. It is not possible to state that in the rights of ownership which he was enjoying prior to execution of the trust deed he was in position to enjoy the remainderman's interest, or in other words, to deal with such interest. Was it possible for Tulsidas to put up for sale the remainderman's interest without executing a trust deed ? The answer has to be in the negative : and immediately the fallacy in the reasoning adopted by revenue and accepted by Tribunal stands detected.

22. We may examine the issue from slightly different angle. In case Tulsidas was to die intestate prior to execution of the trust deed in question what would be the position in relation to the rights which have been granted to Shakuntalaben or her sons on her death. Shakuntalaben being sister of Shri Tulsidas it would not have been possible for her to stake any claim to the property as per provisions of the Hindu Succession Act, and if she would not have been entitled, much less her sons who are the assessees in the present case.

23. In light of what is stated hereinbefore we hold that the assessee acquired the right in the remainderman's only on the death of his mother Shakuntalaben viz.12/10/1970. That from the time when the trust deed was executed viz. 16/5/1960 till she expired on 12/10/1970 the right of the assessee was only contingent. Thus, in case of such right, not only is there no previous owner as right although contingent, has come into existence only on execution of the trust deed, but there is no conceivable cost of acquisition. Though it could be said that so far as Shakuntalaben was concerned on execution of the trust deed a right vested in her subject to the life interest of the settlor and the parents. Inspite of this fact situation even by applying provision of Section 49(1) of the Act the backward chain would snap at settlor i.e. Tulsidas and it is not possible to conceive a cost in the hands of the settlor. The Tribunal therefore, on the one hand held that the settlor created the remainderman's interest and on the other hand went on to state that possibly the bigger HUF had perhaps acquired the property otherwise than under the modes prescribed under section 49 of the Act. If the asset was 'created' by the settlor the cost of acquisition (creation) has to be ascertainable in the hands of the settlor. There is no material on record to establish this cost. On the other hand applicability of Section 49 beyond settlor fails because it is not known how and when the HUF of Hargovandas Girdharlal acquired the property, provided it can be said with certainity that the property in the form it was sold was acquired by the said HUF. The computation provision which forms the integrated code with the charging provision thus fails and it is not posible to uphold the view of the Tribunal that the assessee was liable to be charged u/s.45 of the Act with capital gains tax.

24. The Tribunal was therefore in error in holding that the assessee was liable to be taxed on capital gains on account of sale of his interest arising under trust deed dated 16/5/1960 on the death of his mother Shakuntalaben. The question is therefore answered in the negative i.e. in favour of the assessee and against the revenue in both the references.

25. The References thus stand disposed of with no order as to costs.

Sd/- Sd/-
(A.R.Dave,J) (D.A.Mehta, J)
m.m.bhatt